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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Beehive Telephone Company, Inc.	)	CC Docket No. 97-249
Beehive Telephone, Inc. Nevada	)	
	)	Transmittal No. 8
Tariff F.C.C. No. 1	)	

OPPOSITION TO PETITION FOR RECONSIDERATION

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OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.106(g) of the Commission's Rules, 47 C.F.R. § 1.106(g), AT&T Corp. ("AT&T") hereby opposes the petition for reconsideration filed by Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively, "Beehive").

Beehive argues that the Commission should reconsider its June 1, 1998 Order requiring it to refund its excessive access charges imposed on ratepayers between January 1, 1998 and the effective date of its new, prescribed rates.[1] Specifically, it states that (i) the decision was not the result of a fair process or reasoned decision-making, and that the Commission "made issues appear out of thin air" in order to prescribe Beehive's rates; (ii) the Commission offered Beehive no opportunity to engage in ex parte discussions to address new issues; (iii) the Commission required Beehive to justify its rates

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[1] Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, Tariff F.C.C. No. 1, Tr. No. 8, CC Docket No. 97-249, Memorandum Opinion and Order (1998) ("June 1 Order").

under Part 32 of its rules, to which Beehive is not subject as a small local exchange carrier; and (iv) the order contains several factual errors and legal errors related primarily to Beehive's extraordinary litigation expenses. There is no merit to any of Beehive's arguments.

BEEHIVE WAS GIVEN ADEQUATE NOTICE AND A FULL OPPORTUNITY TO PRESENT ITS DIRECT CASE.

Beehive argues that except for a list of five items, the Commission did not put it on notice that it had to explain its costs. It argues that it was only obligated to address the ratio of operating expenses to total plant in service ("TPIS"), switching lease agreements, litigation expenses, operations expenses and any changes in its data between the filing of its previous access rates in Transmittal No. 6 and its proposed rates in Transmittal No. 8. It insists that the Commission changed the issues in the investigation by pinpointing other problems with its cost data, and not giving it an opportunity to respond to such problems through the ex parte process. Petition at 3-12. Beehive's arguments fail in their entirety because it was given adequate notice of the issues under investigation, the Commission's investigation was clearly confined to the scope of the issues it had designated to discern the lawfulness of Beehive's rates, and Beehive is not entitled as of right to engage in discussions with Commission staff assigned to investigate its rates.

Beehive is a small telephone company subject to the Commission's streamlined filing rules, which it promulgated to allow small carriers to avoid the burdens associated with filing annual access tariffs. The Commission was well aware when it adopted its streamlined rules, however, that small companies, because of their market position, have the ability to abuse the process, and it therefore found that it did not intend to provide incentives for small companies to file access tariffs producing excessive returns.[2] One of the ways in which the Commission monitors the incentive for such abuse is to retain the ability to require these carriers to submit detailed cost and demand data where it deems such information necessary to monitor a carrier's earnings.[3] This is consistent with Section 204 of the Act, which requires that once a tariff rate has been set for investigation, the carrier has the burden of showing that its proposed rates are just and reasonable. A carrier fails to meet its burden of proof under Section 204(a) if it does not provide the data that the Commission requests.

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2 Regulation of Small Telephone Companies, 2 FCC Rcd 3811 (1987).

3 Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, Tariff F.C.C. No. 1, Tr. No. 8, CC Docket No. 97-249, Order Designating Issues for Investigation (rel. Mar. 13, 1998)("March 13 Designation Order"), at para. 2, citing Section 61.39 of the Commission's Rules, 47 C.F.R. § 61.39.

The March 13 Designation Order was very specific about the data Beehive was required to file to justify its rates. It stated clearly that all of Beehive's rates -- premium local switching, local transport and local transport termination -- were under investigation, and that Beehive must explain why its ratio of operating expenses to total plant in service ("TPIS") was so high, and provide detailed cost data and explanations for year over year changes in the entries.[4] In response to Beehive's own claim that its switching equipment and litigation expenses were so high because of its arrangement with JEI, the Commission also directed it to explain these expenses in detail.[5]

The Commission also put Beehive on explicit notice that,

> Failure to provide convincing explanations and justifications of these expense levels may result in prescription of rates that are just and reasonable, and these rates may reflect large disallowances of certain costs claimed by Beehive. If Beehive fails to justify its high costs, the Commission may prescribe rates using a methodology similar to that used in the Beehive Tariff Investigation Order (referring to the January 6, 1998 order prescribing rates based on Beehive's inadequate justification for its proposed 1997 annual access rates).

Accordingly, Beehive was clearly advised of the issues in controversy, and its argument that it somehow

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[4] Id. at paras. 9-10.

[5] Id. at para. 10(d) and (e).

failed to understand that it was required to respond to the Commission's designated issues, and thus to meet its burden under Section 204(a) of showing that its proposed rates were reasonable, is simply baseless.

The data Beehive did submit, as the Commission found, were inconsistent, questionable and unexplained, and included entries which, on their face, did not appear related to legitimate business expenses.[6] For example, Beehive insists that the Commission should not have investigated its unexplained expenses to dentists, toy stores, health care providers, Mr. Brother's ex-wife, and the Internal Revenue Service, as well as expenses associated with JEI, the chat line provider with which it has had an ongoing revenue sharing relationship, because it did not designate these issues specifically for review. Yet, Beehive itself raised the issues of the expenses associated with JEI when it bemoaned the switching expenses, including the capital leases, that it allegedly incurred to "stimulate traffic."[7] It should therefore have been well aware that these expenses were part of the investigation.

Moreover, the Commission clearly stated in the March 13 Designation Order that Beehive was to provide

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[6] June 1 Order at paras. 13-15.

[7] See March 13 Designation Order at para. 10(d), and Beehive Petition for Reconsideration, Trans. No. 6 (filed Feb. 5, 1998) at 16-17, 19-20.

detailed cost data as it existed in its general ledgers for 1994, 1995 and 1996, thereby putting Beehive on notice that any and all costs contained in those ledgers were subject to scrutiny. Accordingly, the Commission's inquiry into unexplained ledger entries clearly fell within the scope of the designated issues.[8] Beehive was also put on notice that it should address these entries because AT&T raised them in its opposition to Beehive's Direct Case.

The rampant anomalies in Beehive's data led the Commission to find that, as a whole, there were substantial questions whether Beehive's apparent lack of a regular accounting system, which it is required to maintain, leaves ratepayers unprotected from paying imprudent expenses or expenses unrelated to regulated interstate access service.[9] Having failed to meet its burden to explain the basis for its expenses in its Direct Case, as it was ordered to do, Beehive asserts that it was treated unfairly because the Commission did not invite Beehive to engage in ex parte communications with Commission staff to discuss the discrepancies. Petition

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[8] Section 204 of the Act grants the Commission broad discretion to order refunds, as it did here, based on data provided to it by the carrier to justify its rates. See 800 Database Access Tariffs, 12 FCC Rcd 5188, 5193 (1997); Investigation of Special Access Tariffs of Local Exchange Carriers, 5 FCC Rcd 1717, 1720 (1990).

[9] Id. at para. 16.

at 11. However, as the Commission has found already with regard to Beehive's 1997 annual access tariff, although ex parte presentations are permitted in a tariff investigation, neither Beehive nor any other carrier is entitled to discuss a Commission investigation with the Commission staff.[10] To the contrary, the burden rests on the carrier under investigation to respond to the issues in its direct and rebuttal cases, which Beehive failed to do.[11]

THE COMMISSION DID NOT RELY IMPROPERLY ON PART 32.

Beehive also argues that the Commission went beyond its jurisdiction in requiring Beehive to justify its rates under Part 32 of the Commission's Rules. Motion at 12-13. To the contrary, Beehive's inability to meet its burden of proof as required under Section 204 directly stems from its failure to maintain any type of useful accounting system.[12]

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[10] Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, CC Docket No. 97-237, Tr. No. 6, Order on Reconsideration (rel. May 6, 1998), at para. 14. In all events, moreover, Beehive offers no explanation why it did not attempt to meet with the Commission staff during the investigation to discuss its concerns as it was permitted to do under the clear terms of the March 13 Designation Order.

[11] March 13 Designation Order at para. 15.

[12] June 1 Order at para. 21.

The Commission did not prescribe rates for Beehive on the basis of Beehive's failure to justify its rates under Part 32. In fact, it stated,

> We do not here prescribe or require Beehive to comply with Part 32 as a general matter of company operations. We merely find that it has not met its burden to justify its proposed rates because it has not presented costs in accordance with Part 32, has not demonstrated that it records costs and revenues in a manner that allows compliance with Parts 64, 36, and 69 of our rules, and has not otherwise explained its accounting system.[13]

Indeed, the Commission was explicit when it promulgated streamlined rules for small telephone companies that the rules were not a license to small carriers to disregard generally accepted accounting principles or otherwise maintain their data in a manner which did not allow for efficient Commission review.[14] Because Beehive chose not to justify its rates using the accounts specified in Part 32 or in any other way which could provide assurance that they permitted the development of lawful interstate access charges, the Commission correctly found that it was unable to rely on the data with any degree of certainty.[15]

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[13] June 1 Order at n.62 (emphasis added).

[14] Regulation of Small Telephone Companies, 2 FCC Rcd at 3813.

[15] June 1 Order at para. 22.

BEEHIVE'S IDENTIFICATION OF FACTUAL AND LEGAL ERRORS IS INCORRECT.

Beehive argues that the Commission's findings in the June 1 Order were based on several incorrect factual and legal errors. Petition at 14-21. Beehive's characterization of these items is incorrect.

Factual Errors.

1. Beehive argues that the Commission did not recognize that Beehive does not provide cable, cellular or other wireless service. Petition at 14. The Commission was merely summarizing Beehive's pleadings when it made this statement, stating simply that Beehive did not provide information about these non-regulated activities.[16] Its findings regarding the lawfulness of Beehive's rates were not based on this information, and Beehive's argument is immaterial.

2. Beehive argues that the Commission did not take notice of Beehive's claim that its cost support for Transmittal No. 8 was more accurate than the cost data filed in support of Transmittal No. 6 because it had corrected "material misstatements" made by its former accounting firm. Petition at 14-15. Because the Commission found that Beehive's cost data supporting Transmittal No. 8 still suffered from "inconsistent,

[16] June 1 Order at para. 10.

questionable and explained entries,"[17] it is clearly immaterial that the data Beehive filed to support its 1997 access rates may have been even more unreliable.

3. Beehive argues that the Commission did not recognize that its new accountants conformed its records to Part 32 standards. Petition at 15. The Commission clearly addressed Beehive's assertion that it presented data in a format consistent with Part 32, and found that it had not done so. It found specifically that expenses recorded by Beehive in several Part 32 accounts were unexplained, and appeared unrelated to the provision of regulated, interstate access service.[18] Significantly, Beehive has still not shown why the Commission's findings with regard to these expenses were substantively incorrect.

4. Beehive argues that the Commission found erroneously that a large portion of its legal expenses were classified as miscellaneous expenses, while it claims that such expenses only accounted for a maximum of 5.73 percent of its overall expenses. The Commission identified the miscellaneous expenses by exact amount ($11,349.19 in 1994 and $23,637.71 in 1995), not percentages.[19] Beehive does not even attempt to show the

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[17] June 1 Order at para. 14.

[18] June 1 Order at para. 14-16, 22.

[19] June 1 order at n.56.

Commission's specific figures are wrong. In any case, Beehive's argument is immaterial because the Commission did not base its findings regarding Beehive's litigation costs on its miscellaneous expenses.

5. Beehive argues that the Commission should have permitted it to recover the expenses associated with the "shareholder" litigation, which was the largest litigation expense for Beehive, and which Beehive characterized as a family dispute in which Mr. Brothers sought to retain control of the Beehive Telephone Companies after his wife filed for divorce. Petition at 15-16; Direct Case at 26-29.

Beehive's Direct Case did not show how much of the expenses associated with the shareholder litigation were personal costs which Mr. Brothers incurred to litigate his divorce, and were therefore not appropriately assigned to the Beehive companies. As the Commission found in its Litigation Costs Order, it has a broad responsibility under Section 201(b) of the Act to ensure that a carrier's operating expenses recovered through tariffed rates are legitimate costs of providing service to ratepayers, and that they are not for activities which are not undertaken solely for ratepayer benefit.[20] Beehive did not meet its burden to show why it was in the

[20] Accounting for Judgments and Other Costs Associated with Litigation, 12 FCC Rcd 5112, 5124 (1997) ("Litigation Costs Order").

interests of its ratepayers to reinstate Mr. Brothers as President or, particularly, how ratepayers benefited from the Beehive Telephone Companies' agreement to pay the legal costs for all parties involved on both sides of the litigation, regardless of their relationship to the company. Beehive Direct Case at 28.[21]

Legal Error.

Beehive further argues that the Commission committed a legal error by failing to presume that Beehive's extraordinary litigation expenses were justified. Petition at 16-22. Although the Commission has held in its Litigation Costs Order that the ratemaking process will presume that the carrier incurred litigation costs (other than for antitrust violations) in the ordinary course of business and that they benefited ratepayers,[22] Beehive ignores that the Commission has also held that presumptions of lawfulness do not survive if a tariff is set for investigation.[23] Beehive therefore still had the burden of proof under Section 204(a)(1) of the Act to show that its rates are just and reasonable, and to the extent that it sought to

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[21] The cases cited by Beehive do not indicate that the companies involved were permitted to recover such extraordinary settlement expenses in their rates.

[22] Id. at 5144.

[23] Policies and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3253 (1989).

recover significant legal expenses, it had to show that its litigation costs were prudent and benefited ratepayers.

Beehive did not make such a showing with respect to most of the legal expenses it sought to recover in its proposed rates. In fact, after multiple opportunities to justify its litigation expenses associated with the shareholder suit and the contract dispute against James Ball, Beehive has still failed to demonstrate that they were related in any way to legitimate business interests, and has therefore failed to show that they were properly recovered in its rates. Its claim (Petition at 20) that it went to "great lengths" to describe each proceeding is untrue. In addition to its failure to explain how ratepayers benefited from the shareholder litigation, Beehive never explained how its alleged breech of an agreement to pay out benefits to Mr. Ball as part of an educational trust benefited ratepayers or was a contract dispute that related in any way to Beehive's provision of interstate access service.

Beehive also did not show why its failed attempt to expand its business ventures into U S WEST territory in the "Hanksville litigation" benefited existing access customers. Indeed, in the Litigation Cost Order, the Commission cited with approval a case stating that benefit is measured in terms of what ratepayers would have decided

in their own economic self-interest.[24] As AT&T pointed out in its rebuttal, Beehive's attempt to expand its exchange territory in 1994 and 1995 did not and would not have benefited IXC ratepayers, who would have been forced to pay Beehive's grossly inflated access rates during those years to originate and terminate long distance traffic in those exchanges. Because Beehive raised its access rates for all customers when it de-pooled from NECA in order to fund the chat line, IXC customers would have been forced to pay rates of $.47 and $.14 per access minute of use in the Hanksville exchanges had Beehive prevailed in its suit as compared to paying U S WEST $.02913 per minute in 1994 and $.027895 in 1995 for the same service. AT&T Opposition to Beehive Direct Case at 9-10.

[24] 12 FCC Rcd at 5124, n.62.

WHEREFORE, for the foregoing reasons, Beehive's petition for reconsideration should be denied in its entirety.

Respectfully submitted,

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July 15, 1998

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 15th day of July, 1998, a copy of the foregoing "Opposition to Petition for Reconsideration" of AT&T Corp. was served by U.S. first class mail, postage prepaid, to the parties listed below.

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